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No. 518

In the Supreme Court of the United States

OCTOBER TERM, 1932

PACIFIC COAST STEEL COMPANY, A CORPORATION, PETITIONER

v.

JOHN P. MCLAUGHLIN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	4
Argument	5
Conclusion	13
Appendix	14–16

CITATIONS

Cases:	
Aiken v. *Burnet*, 282 U. S. 277	3, 6
Brown, W. P., & Sons Lumber Co. v. *Burnet*, 282 U. S. 283	6
Burnet v. *Chicago Railway Equipment Co.*, 282 U. S. 295	7, 12
McDonnell v. *United States*, No. 330, October 1932, Term	4, 8, 12
Russell v. *United States*, 278 U. S. 181	9, 11
Stange v. *United States*, 282 U. S. 270	6, 7, 12
Statutes:	
Revenue Act of 1921, c. 136, 42 Stat. 227, 265, Sec. 250	5
Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300—	
Sec. 277 (U. S. C. Title 26, Sec. 1057)	14
Sec. 278 (U. S. C. Title 26, Sec. 1060)	14
Sec. 1100 (U. S. C. Title 26, Sec. 1260)	11
Revenue Act of 1926, c. 27, 44 Stat. 9, 58, 59—	
Sec. 277 (U. S. C. App., Title 26, See. 1057)	15
Sec. 278 (U. S. C. App., Title 26, Sec. 1060)	15
Miscellaneous:	
House Report No. 179, 68th Cong., 1st Sess., pp. 26 and 64	11
Mim. 3085, C. B. II–1, p. 174	3
Senate Report No. 398, 68th Cong., 1st Sess., p. 32	11

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BRIEF FOR THE RESPONDENT

OPINION BELOW

No opinion was rendered by the District Court. The court's findings of fact and conclusion of law are contained in the record, pages 37–40. The opinion of the Circuit Court of Appeals (R. 65–86) is reported in 61 F. (2d) 73.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 22, 1932. (R. 86–87.) A petition for certiorari was filed November 21, 1932, and

granted January 9, 1933, limited to the question of the effect of Section 278 (e) of the Revenue Act of 1924. (R. 89.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a waiver of the statute of limitations, executed after the Revenue Act of 1924 became effective, as to the collection of income taxes for 1917, assessed prior to the effective date of the 1924 Act, is invalid by reason of the provisions of Section 278 (e) of that Act.

STATUTES INVOLVED

The applicable provisions of the statutes involved are set forth in the Appendix (*infra*, pp. 14–16).

STATEMENT

Petitioner brought this suit in the District Court for the Northern District of California to recover income and excess-profits taxes collected for the year 1917. The following is a summary of the findings of fact made by that court (R. 37–40):

On March 30, 1918, petitioner filed its income-tax return for 1917 with the Collector of Internal Revenue for its district and paid the tax shown to be due on this return. (R. 37.) On December 9, 1922, the Commissioner of Internal Revenue determined a deficiency for 1917 of $257,443.30. (R. 37–38.) On December 16, 1922, the petitioner consented to a determination, assessment, and collection of income

and excess-profits taxes against it for the years 1911 to 1917, inclusive, under the Revenue Act of 1921 or any prior Revenue Act, irrespective of any period of limitations.[1] (R. 38.)

On February 9, 1923, a deficiency in the above amount of $257,443.30 was assessed against the petitioner, and on April 1, 1923, a notice and demand for payment was made by the Commissioner. No proceeding to collect this deficiency was begun prior to December 7, 1925. On that day the petitioner agreed to waive the time prescribed by law for making any assessment of taxes for 1917, 1918, 1919, and 1920, this waiver to remain in effect until December 31, 1926. (R. 38–39.) This period was on November 19, 1926, extended to December 31, 1927. (R. 39.)

On July 16, 1927, the Commissioner demanded payment of the deficiency of $129,200.06 in taxes for 1917 remaining after the application of overpayments by petitioner of its taxes for 1918 and 1919 as credits upon the deficiency for 1917. (R. 39.)

Petitioner paid the balance of the deficiency claimed on August 27, 1928, and filed a claim for refund on October 23, 1928, for its 1917 taxes in the amount of $284,252.20, which was rejected December 14, 1928. (R. 39–40.)

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[1] Under a later ruling of the Treasury Department this consent was held to expire on April 1, 1924, Mim. 3085, C. B. II–1, p. 174. *Aiken* v. *Burnet*, 282 U. S. 277, 279.

The District Court gave judgment for respondent (R. 46–47), and the Circuit Court of Appeals affirmed this judgment (R. 86–87). This Court granted certiorari, "limited to the question of the effect of Section 278 (e) of the Revenue Act of 1924." (R. 89.)

SUMMARY OF ARGUMENT

Under the decision in *Russell* v. *United States*, 278 U. S. 181, the provisions of paragraph (e) of Section 278 of the Revenue Act of 1924 do not apply to a tax assessed before the Revenue Act of 1924 became effective, and consequently the limitation in that paragraph does not apply to the taxes here involved, which were assessed before the Act became effective. The waiver in 1925 was valid and extended the period of collection within its stated terms. It was authorized by Section 250 (d) of the Revenue Act of 1921 as kept in effect by the 1924 Act.

However, if Section 278 of the 1924 Act makes no distinction between waivers of collection given for taxes assessed before the effective date of that Act and those after that date, we submit that paragraph (c) of that section applies to collection as well as assessment waivers, and made effective the waivers in question. Furthermore, any doubt as to the validity of these waivers under Section 278 of the 1924 Act is removed by Section 278 of the 1926 Act. We adopt the argument set forth in the brief for the United States in *McDonnell* v. *United*

States, No. 330, October Term, 1932, now pending after argument, which deals with the effect of paragraph (e) on paragraph (c) of Section 278 of the 1924 Act, and we also adopt the argument made therein as to the effect of Section 278 of the 1926 Act. As there argued, the waivers executed after 1924 were clearly valid and effective.

ARGUMENT

Petitioner filed its income tax return for 1917 on March 30, 1918. Under Section 250 (d) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 265,[2]) the time for the assessment and collection of taxes for this year expired March 30, 1923, unless this period was extended by a written agreement of the Commissioner of Internal Revenue and the taxpayer. On February 9, 1923, which was within five years from the time the return was filed, the Commissioner made a valid deficiency assessment for 1917.

Although a demand was made, no proceeding to collect this deficiency was begun within the five-year period as extended by waiver.[3] On December 7, 1925, which was after this period had expired,

[2] This statute provided that the amount of taxes due for the year 1917 "* * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed, * * *."

[3] See footnote 1 (*supra*).

the petitioner agreed by written waiver to extend the time for making collection[4] to December 31, 1926. On November 19, 1926, an additional waiver was given, further extending this period to December 31, 1927. (R. 38–39.) Within this latter period a part of the deficiency was paid by the application of a credit. As the waivers extended the period for collection to December 31, 1927, which was within the effective date of the Revenue Act of 1926, the six-year period allowed for collection after an assessment had been made, as provided by Section 278 (d) of that Act (*infra*, p. 15), applied, and this period extended to February 9, 1929. The remainder of the deficiency was collected August 27, 1928. The court below held that the collection of the deficiency assessment by credit and subsequent payment of the balance within the time limited by Section 278 (d) of the 1926 Act, was timely.

No express statutory provision is necessary to make valid a waiver by a taxpayer of the period of limitations on the collection of a tax. *Aiken* v. *Burnet*, 282 U. S. 277; *W. P. Brown & Sons Lumber Co.* v. *Burnet*, 282 U. S. 283. Furthermore, a collection waiver is not invalid merely because it

[4] Although these waivers in terms mentioned only "assessment" they also operated to extend the time for collection. *Stange* v. *United States*, 282 U. S. 270; *Aiken* v. *Burnet*, 282 U. S. 277; *W. P. Brown & Sons Lumber Co.* v. *Burnet*, 282 U. S. 283. In the petition for certiorari it was urged that these waivers did not relate to collection but certiorari was limited to the question of the effect of Section 278 (e) of the Revenue Act of 1924.

was executed after the applicable period of limitations had expired. *Stange* v. *United States*, 282 U. S. 270; *Burnet* v. *Chicago Railway Equipment Co.*, 282 U. S. 295. Consequently the waivers executed in this case were valid and effective unless they were rendered invalid by express statutory provisions.

The Revenue Act of 1924 became effective June 2, 1924, and was in force when the waiver of December 7, 1925, was executed. Section 277 of that Act established periods of limitations for the collection of all taxes imposed by that and earlier Acts. The provisions of this section were made subject to the exceptions set forth in Section 278. Paragraph (a) of the latter Section provides that, in the case of a false or fraudulent return, the assessment and collection of a tax might be made at any time; paragraph (b) that any deficiency due to a change in an amortization allowance under the Revenue Acts of 1918 or 1921 might be assessed or collected at any time; paragraph (c) that the Commissioner and the taxpayer may consent to the *assessment* of a tax after the time prescribed in Section 277; and paragraph (d) that where a tax had been assessed within the period prescribed in Section 277 or Section 278 it may be collected within six years after the assessment. Paragraph (e), the final paragraph of this section, provides that—

> (e) This section shall not (1) authorize the assessment of a tax or the collection

> **thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.**

Petitioner contends that this paragraph made the waiver of December 7, 1925, ineffective, because the collection became barred on April 1, 1924, when the waiver of December 16, 1922, expired.[5] This was prior to the enactment of the Revenue Act of 1924. This Court, in granting certiorari, has limited its review to a consideration of the effect of Section 278 (e) of the Revenue Act of 1924.

We submit that paragraph (e) (1) of that section has no application to the collection of a tax validly assessed before the Act became effective,

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[5] In *McDonnell* v. *United States*, No. 330, October Term, 1932, argued January 17, certiorari was limited, as in this case, to the question of the effect of Section 278 (e) of the 1924 Act. The *McDonnell case* involved the question of the effect of that section on *assessment* waivers given after the effective date of the Act and after the time for assessment had run. This case involves the effect of that section on *collection* waivers given under like circumstances, with the important difference that here the assessment had been timely made, before the 1924 Act had become effective. Much of what was said in the Government's brief in the *McDonnell case* applies here. We believe that if the Government is sustained in the *McDonnell case* it should prevail here. And even if the *assessment* waivers in that case are held invalid, we think, for the reasons hereinafter given, the *collection* waivers in this case are good.

and that subdivision (2) of that paragraph expressly exempts from the operation of the section the tax in question. In *Russell* v. *United States,* 278 U. S. 181, this Court considered whether Section 278 of the 1924 Act applied to an assessment made before that Act became effective so as to extend the period for collection. It held that paragraph (d) applied only to taxes which had not been assessed at the time the Revenue Act of 1924 became effective. It was pointed out that a distinction was made in that Act between existing assessments and those yet to be made, by reason of the fact that the Board of Tax Appeals had been established with the right to appeal thereto whenever thereafter the Commissioner should propose to assess a deficiency. Since the appeal would not lie where the assessment had already been made, there was not the reason for the extended period for collection that existed if the Board was to review the Commissioner's action. It was said (p. 188):

> No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in § 278 or otherwhere.
>
> * * * *The rather obvious design, we think, was to deprive § 278 of any possible application to cases where assessment had been made prior to June 2, 1924.* (Italics ours.)

The above language of this Court expressly covers the instant case, and, unless it is to be qualified,

prevents application of Section 278 (e) of the 1924 Act as a bar to collection of the taxes now involved, which otherwise would be valid.

There is a further reason for concluding that the "collection" referred to in subdivision (1) of paragraph (e) of Section 278 of the 1924 Act does not mean the collection of a tax theretofore assessed. The provision is that the section shall not "authorize the assessment of a tax or the collection *thereof* by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence." (Italics ours.) We submit that the terms "assessment" and "collection *thereof*" must be read together as applying to the same tax, and that "collection *thereof*" refers only to the collection of a tax, the assessment of which was barred at the time the Revenue Act of 1924 became effective, and that the collection of a tax already assessed at that time is not within the operation of this subdivision. The use of "thereof" indicates that this was the purpose of Congress. Unless this construction is adopted, the second part of the subdivision would seem to be without effect for it is there provided that the section shall not "affect any assessment made * * * before the enactment of this Act." To construe this section as barring the collection of a tax already assessed would clearly "affect any assessment made" within the meaning of the statute. The language quoted above from the *Russell case* supports this construc-

tion. Furthermore, it is in accord with the intent of Congress. See House Report 179, 68th Cong., 1st Sess., pp. 26 and 64; Senate Report 398, 68th Cong., 1st Sess., p. 32.

It has been argued above that the waiver of December 7, 1925, was valid without any statutory provision to authorize it, even though it was given after the applicable period of limitations had expired. If this is so, the waiver in question, not being affected by Section 278 of the 1924 Act, was a valid link in the extension of time until the collection in question was made. If, as the language in the *Russell case* and in subdivision (2) of paragraph (e) of Section 278 of the 1924 Act indicates, paragraph (c) of that section does not cover the waiver in question, we submit that it is authorized by Section 250(d) of the Revenue Act of 1921, which gives effect to a written waiver by the Commissioner and taxpayer of a later assessment and collection of a tax than that allowed by the statute of limitations. This section, as applied to the collection in question, was kept in force by Section 1100(b) of the Revenue Act of 1924, which provides that the parts of the Revenue Act of 1921 that are repealed by the 1924 Act shall remain in force for the assessment and collection of taxes imposed by the 1921 Act.

But if Section 250 (d) has been superseded as to the tax in question by the 1924 Act, and Section 278 of that Act is applicable here we submit that,

as was suggested in the footnote in *Burnet* v. *Railway Equipment Co.*, 282 U. S. 295, 300, paragraph (c) of the latter section was not modified by its paragraph (e) and the waiver in question was authorized by paragraph (c). Although that paragraph referred only to assessment waivers, it should be construed to include collection waivers. (*Stange* v. *United States,* 282 U. S. 270.) The argument in the Government's brief in *McDonnell* v. *United States,* No. 330, October Term, 1932, now pending after argument, more fully develops our contention as to the effect of paragraph (c) on assessment waivers. It is, we believe, applicable also to collection waivers. That brief also establishes that all doubt as to the validity of the waivers in this case under Section 278 of the Revenue Act of 1924 is removed by Section 278 of the Revenue Act of 1926. In view of the limitation of the question as to which certiorari was granted we do not burden the Court with a repetition of the contentions made in our brief in No. 330 and adopted, so far as applicable, here.

CONCLUSION

The judgment of the court below is correct and should be affirmed.

Respectfully submitted.

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FEBRUARY, 1933.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057.)

SEC. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C., Title 26, Sec. 1060.)

* * * * *

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C., Title 26, Sec. 1062.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 58, 59:

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)

SEC. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C. App., Title 26, Sec. 1060.)

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C. App., Title 26, Sec. 1061.)

(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor

shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act. (U. S. C. App., Title 26, Sec. 1062.)

U. S. GOVERNMENT PRINTING OFFICE: 1938